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Supreme Court of the United States

October Term, 1997

AT&T CORP., *et al.*,

Petitioners,

-*v.*-

IOWA UTILITIES BOARD, *et al.*,

Respondents.

AT&T CORP., *et al.*,

Petitioners,

-*v.*-

CALIFORNIA, *et al.*,

Respondents.

MCI TELECOMMUNICATIONS CORPORATION,

Petitioner,

-*v.*-

IOWA UTILITIES BOARD, et al.,

Respondents.

(Actions continued on inside of cover)

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR STATE COMMISSION RESPONDENTS AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN OPPOSITION

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-*v.*-

IOWA UTILITIES BOARD, *et al.*,

Respondents.

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Question Presented

Whether the United States Court of Appeals for the Eighth Circuit correctly held that the Telecommunications Act of 1996 does not grant the Federal Communications Commission the authority to dictate local pricing standards to the State commissions?

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JOINT BRIEF FOR STATE COMMISSION RESPONDENTS AND THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS IN OPPOSITION

Opinions Below

The principal opinion of the Court of Appeals in *Iowa Utils. Bd. v. FCC* is reported at 120 F.3d 753 and is reproduced in the Appendix to the Petition for Certiorari at 1a-67a. The court's order on rehearing is not yet reported. The opinion of the Court of Appeals in *California v. FCC* is reported at 124 F.3d 934. The First Report and Order of the Federal Communications Commission (FCC) is reported at 11 FCC Rcd. 15,499, and the Second Report and Order of the FCC is reported at 11 FCC Rcd. 19,392.

Jurisdiction

The judgment of the Court of Appeals in *Iowa Utils. Bd.* was entered on July 18, 1997. A subsequent order in that case, granting rehearing in part and denying rehearing in part, was issued on October 14, 1997. The judgment in *California v. FCC* was entered on August 22, 1997. Petitions for a writ of certiorari were filed between November 17 and November 19, 1997. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

Statement of the Case

In February, 1996 Congress passed the Telecommunications Act of 1996, which adopted a framework to open all local telecommunications markets to competition. Publ L. No. 104-104, 110 Stat. 56, *codified at and amending* the Communica-

tions Act of 1934, 47 U.S.C. section 151, *et seq.* (1996).[1] In lieu of active regulation, Congress sought to rely primarily on private negotiations between competitors to resolve the broad range of technical and pricing issues associated with interconnection and access to a local exchange carrier's facilities and services. To the extent that negotiations fail, carriers may request State commissions to mediate or arbitrate disputes.

The Act establishes specific pricing standards under section 252(d) that are to be used by the State commissions in the event parties cannot agree on prices and seek arbitration under section 252(b). Final agreements, whether voluntarily negotiated or adopted through arbitration, are brought before State commissions for approval. Only if a State commission demonstrably fails to carry out its responsibility under section 252 is the FCC empowered to "assume the responsibility of the State commission. . . ." 47 U.S.C. section 252(e)(5). In other words, FCC jurisdiction attaches *only* if the state fails to act.

The Act does alter narrow aspects of state and federal jurisdiction by granting the FCC rulemaking jurisdiction over several matters historically regulated by the states. *See* sections 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g) and 251(h)(2). However, the Act does not alter the fundamental, dual jurisdictional scheme codified decades ago in section 2 of

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[1] According to the FCC, today some 92 percent of telephone calls are intrastate or local in nature and only 8 percent are interstate in nature. Statistics of Communications Carriers (FCC, 1994), at 22. The telephone network, while used predominately for intrastate calls, carries both interstate and intrastate calls. It has been and will remain a dual-use network.

the Communications Act, 47 U.S.C. section 152.[2] The legislative history of the Telecommunications Act makes it clear that apart from the narrow areas where it expressly provided to the contrary, Congress intentionally chose to leave the Act subject to section 152(b). The provisions requiring the FCC to engage in the jurisdictional separation of telephone service costs into interstate and intrastate components for ratemaking purposes also remained in place. *See* 47 U.S.C. sections 221(c) and 410(c).

On August 8, 1996, six months after passage of the Act, the FCC released two orders on local competition, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd.15,499(1996) (First Report and Order), and *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 19,392 (1996) (Second Report and Order). In the First Report and Order (First R&O), the FCC found that sections 251, 252, and 253 of the 1996 Act required it to establish rules to govern interstate and intrastate prices for unbundled network elements, interconnection, resale, collocation, and termination of transport. (Pet. App. 190a) It asserted that the 1996 Act created a "parallel" jurisdictional scheme for the FCC over both interstate and intrastate matters under sections 251 and 252. (Pet. App. 191a). It also contended that section 152(b) did not preclude FCC regulations governing intrastate matters and that Congress intended it to adopt national rules for the states to follow in implementing the 1996 Act. (Pet. App. 192a-193a). This analysis was also the jurisdictional basis for the Second Report

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[2] Section 152(a) grants the FCC exclusive jurisdiction over interstate communications, while section 152(b) gives the states exclusive jurisdiction over intrastate matters. Section 152(b) specifically states "[N]othing in this Act shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire. . .of any carrier."

and Order. (Pet. App. 341a). Under the FCC's interpretation, nearly all meaningful intrastate rate jurisdiction was effectively removed from State commissions.

It was these findings that 33 States and the National Association of Regulatory Utility Commissioners disputed, seeking review in a number of federal circuits. The petitions contesting the First R&O were consolidated and assigned by lottery to the Eighth Circuit. *See* 28 U.S.C. 2112(a)(3).

Little more than one year ago, the Eighth Circuit Court of Appeals, at the urging of four States and several incumbent local exchange carriers, stayed the effectiveness of the FCC's extensive First R&O rules setting national pricing standards for interconnection. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996). In staying those rules the Eighth Circuit found the FCC had exceeded its jurisdiction by promulgating pricing rules regarding local telephone service. The Court stated:

> In this first look at the issue, we are skeptical that the FCC's roundabout construction of the statute could override what, at first blush, appears to be a rather clear and direct indication in subsections 252(c)(2) and 252(d) that the state commissions should establish prices.

Id. at 424.

Immediately following the issuance of the stay, the Acting Solicitor General, on behalf of the FCC filed with the Supreme Court an application seeking a vacation of the stay.[3] The

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[3] Both AT&T and MCI in their respective statements of the case fail to mention the unsuccessful appeals to the Supreme Court for vacation of the stay.

application raised substantially the same arguments brought before this Court in the pending petitions for certiorari.[4] Without opinion, the Court denied the applications filed by the FCC and several other parties to lift the stay. *See FCC v. Iowa Utils. Bd.*, 117 S.Ct. 378, 379 (1996) (Thomas, J., in chambers), *motion to vacate denied* 117 S.Ct. 429 (1996). The case reviewing the First R&O progressed to an expedited ruling on the merits, confirming the earlier jurisdictional ruling on the stay (Pet App. 1a-67a).

The Telecommunications Act of 1996 has been in effect since February of 1996. State commissions have met each of the deadlines and responsibilities imposed by the Act. As indicated in a report compiled by the National Association of Regulatory Utility Commissioners and published in September of this year[5], State commissions have certified more than 1110 new competitors to provide local service. Over 180 arbitrations have been completed following the process set out in section 252(b). Over 500 interconnection agreements have been approved pursuant to section 252(d) and are available as a framework for providing local service. The transition has

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[4] A close comparison of the arguments advanced by the Acting Solicitor General in its "Application to Vacate a Stay Entered by the United States Court of Appeal for the Eighth Circuit" with this petition for certiorari shows a recycled effort. For example, the arguments contained in the section entitled "Reasons for Granting the Petition" beginning on page 11 of the petition through page 18 and pages 22 through 24 are nearly identical to arguments advanced to and considered by this Court one year ago. Indeed, many of the arguments in the FCC's petition are taken verbatim from that pleading.

[5] See "Telecommunications Competition 1997, A State-By-State Report on Pro-Competitive Measures in Intrastate Telecommunications," NARUC 1997.

begun and the basic building blocks envisioned by the Act are being put in place according to the schedule set out in the Act.[6]

Reasons for Denying the Petitions

Each of the petitions for certiorari implies that the Telecommunications Act of 1996, as interpreted by the Eighth Circuit, is not workable and that the states are both unable and unwilling to bring competition into the local markets. The progress made since the passage of the Act belies these assertions and demonstrates that a decision granting certiorari could actually delay competition.[7]

The FCC, and other petitioners, argue that the Eighth Circuit's vacation of the FCC's pricing methodology "has deprived the district courts of a national regulatory framework within which to review state arbitration proceedings and has relegated many of the fundamental disputes . . . to piecemeal litigation in disparate [district court] proceedings throughout the United States. (FCC petition at p. 23). These allegations lack merit. District courts and States are bound by the "national regulatory framework" specified in the statute.[8] In

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[6] Again, there has not been a case where the state failed to act which would have allowed FCC action pursuant to section 252(e)(5).

[7] For example, reinstatement of the FCC rules could require reevaluation of existing agreements as well as a remand of the arbitration agreements currently under review to ensure formal compliance with the FCC's methodology.

[8] Subsection 252(d), captioned "Pricing Standards", requires "[d]eterminations *by a State Commission* of the just and reasonable rates for the interconnection of facilities . . .and. . .for network elements. . ." be in accordance with the statute's listed terms. (emphasis added)

requiring local district court review,[9] Congress implicitly acknowledged, that, beyond the Act's pricing standards, other issues arising with respect to interconnection, are questions of fact. Moreover, the other broad, non-price issues the FCC's original orders seek to implement are not being subjected to "piecemeal litigation." Both decisions under review provide guidance to the district courts on the majority of these issues.

In support of a claim that the FCC can best bring about competition, AT&T and MCI repeatedly imply the FCC has pushed competition in local markets whenever possible, and the States have been recalcitrant. The record is replete with examples of States' pro-competitive efforts predating the Act. In fact, the FCC recognized that States' efforts to promote competition predated a national approach and the Act borrowed extensively from state initiatives. (Pet. App. 155a-157a, 165a-166a).

In any event, the issue is not whether the States or FCC have been more pro-competitive or whether the States or federal government are more capable of bringing competition to the local market, but whether Congress assigned responsibility to the FCC to dictate a single set of local rate standards. As this Court stated in *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986):

> [W]e do not assess the wisdom of the asserted federal policy of encouraging competition within the telecom-

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[9] Several states, citing the Eleventh Amendment, have challenged the jurisdiction of the federal courts over State commissions in such cases. *See e.g., US WEST Communications, Inc. v. Thoms*, Civil No. 4-97-CV-70082, slip op. (S.D. Iowa Aug. 4, 1997); *U S WEST Communications, Inc. v. Reinbold*, Civil No. A1-97-25, slip op. (D. N.D. Jul. 28, 1997); *U S WEST Communications, Inc. v. TCG Seattle*, No. C97-354WD, slip op. (W.D. Wash. Jul. 24, 1997).

> munications industry. Nor do [w]e consider whether the FCC should have the authority to enforce as it sees fit, practices which it believes would best effectuate this purpose. Important as these issues may be, our task is simply to determine where Congress *has* placed the responsibility. . . "

476 U.S. at 359 (1986).

Once the arguments regarding competitive policy are stripped away, it is clear this Court should deny certiorari. The Eighth Circuit decisions that responsibility for determining prices was expressly granted to the States by Congress are demonstrably correct, and the decisions do not conflict with the decisions of other federal circuits.

I.

THE EIGHTH CIRCUIT'S DECISIONS ARE CORRECT

The petitioners attempt to discredit the Eighth Circuit's analysis on local pricing standards by claiming it "rests on a basic misunderstanding of the telecommunications system and telecommunications law."[10] (FCC petition at p. 19). There is absolutely nothing in the Eighth Circuit's decisions concerning jurisdiction that reflects a misunderstanding of either the

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[10] The FCC went as far as to entreat this Court to take this case and "not allow the outcome of this case, with its enormous nationwide implications, to depend on which circuit happened to be selected in a jurisdictional lottery." (FCC petition at p. 22).

telecommunications system or the Act.[11] Petitioners' rhetoric aside, the Eighth Circuit's statutory analyses rest on two, rock-solid bases: first, the plain meaning of the statute, and second, application of the principles articulated by this Court in *Louisiana.*

The Eighth Circuit found that the Act plainly grants the State Commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act. (Pet. App. 10a-15a). The Act assigns no local ratesetting responsibilities to the FCC. Section 251(c) makes no mention of FCC rate regulations. In direct contrast, subsection 252(c)(1) and (2) set forth the standards State commissions must apply in arbitrations when deciding disputes over rates.[12]

The FCC relies heavily on the directive outlined in section 251(d)(1) that it "complete all actions necessary to establish regulations to implement the requirements of this section." However, section 251(d)(1) calls for rules only in the circumscribed areas where Congress has specifically directed the FCC to act. *See* sections 251(b)(2), 251(c)(4)(B), 251(d)(2), 251(e), 251(g) and 251(h)(2). Had Congress expected the

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[11] If anything, it is the FCC's petition that evidences not only a misunderstanding of the Act, but a disregard for even the FCC's own prior statements. For example, the FCC's petition claims "interstate charges (*e.g.*, subscriber line charges) determined by the FCC ..." have long been a component of local retail rates. (FCC petition at p. 19). This allegation stands in stark contrast to the FCC's insistence in the First R&O that the "subscriber line charge is a component of interstate access rates, not of intrastate local service rates." (First R&O, para. 984).

[12] In setting rates, States are directed to follow only the standards outlined in section 252(d). The 251(c)(2)(D) obligation that incumbent local exchange carriers provide interconnection at rates that are just and reasonable requires that these rates conform to the prices set by the States under 252(d).

FCC to set all rules necessary for the carriers to meet their obligations, section 251(d)(1) would have explicitly stated that the FCC rules extended to all regulation necessary to implement section 251.[13]

The FCC claims in its petition that Congress was "quite clear in granting the Commission authority to implement the core provisions of Section 251, including the dialing parity provision of Section 251(b)(3) and the pricing provisions of Section 251(c)."[14] (FCC petition at p. 16). However, the FCC's arguments are based on a convoluted reading of various sections of the Act, illogical assumptions, unfounded implications[15] and a demand for deference to preempt areas traditionally regulated by the states.[16]

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[13] Moreover, it would have directed in section 252(d), the pricing provision, that the FCC make the determinations regarding just and reasonable rates for the purpose of section 251, or it would have directed the states to follow the FCC's rules in resolving disputes subject to arbitration.

[14] The FCC previously acknowledged that sections 251 and 252 do not contain an explicit grant of intrastate authority to the FCC. (Pet. App. 191a).

[15] For example, on page 13 of its petition, the FCC states "Section 251(d)(2) *assumes* that the Commission has jurisdiction to implement Section 251(c)(3)." On page 14, it states "*[b]y obvious implication* Section 251(d)(3) *presupposes* that the Commission does have authority . . . to preempt state laws. . . ." (emphasis provided)

[16] This Court consistently has articulated a stringent legal standard for determining whether federal law preempts state law. Where federal action preempts activities traditionally regulated by the states, such as local telephone services, the Court "'start[s] with the assumption that the historic police powers of the States were not to be superseded. . . unless that was the clear and manifest purpose of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2376 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

Any ambiguity regarding the FCC's lack of authority over local telecommunications is resolved by following this Court's directive on the operation of section 152(b). *See Louisiana* at 377. As this Court stated, section 152(b) constitutes an "explicit congressional denial of power to the FCC." *Id.* To override this reservation of intrastate authority in section 152(b) requires "unambiguous and straightforward" authority over intrastate matters or a modification of section 152(b).[17] *Id.*

Moreover, section 601(c) of the Act states the FCC cannot rely on an implicit grant of authority to make rules over exclusively intrastate matters. Congress would not have been so oblique if it intended a major shift in regulation of the local market. Finally, deference for an agency construction is improper where the statute is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

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[17] The FCC's petition claims that Congress' retention of section 152(b) was non-substantive. (FCC pet. at p. 18, n. 8). By the FCC's own admission, early drafts of the Act would have expressly excepted Title II, and thus sections 251 and 252, from the applicability of section 152(b). (Pet. App. 187a, 197a). However, the final version of the 1996 Act omitted the express exception. The only reasonable inference to be drawn is that, apart from the narrow areas where it expressly provided to the contrary, Congress consciously chose to leave the Act subject to section 152(b). *See Rusello v. United States*, 464 U.S. 16, 23-24 (1983).

II

THE HOLDING IN THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS

The petitioners allege a conflict among circuits as a result of the Eighth Circuit's decision. No conflict exists;[18] indeed, no other court has even ruled on the jurisdictional boundaries of sections 251 and 252 in the 1996 Act.[19]

In support of its claim of a conflict, the FCC contends that other courts have held section 152(b)'s jurisdictional separation to be of limited force because the same facilities are used to provide local and interstate services. (FCC Pet. at pp. 20-21). We know of no court that has accepted such a claim. Moreover, this Court has specifically rejected the same argument. *Louisiana,* 476 U.S. at 373.

The petitioners rely on cases applying an "impossibility" exception to section 152(b) to allege a conflict.[20] That narrow

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[18] The FCC admits as much when it cites to conflicts with decisions of courts of appeals in "analogous" cases (FCC petition at p. 19) and states there is a conflict "in principle." (FCC petition at p. 20).

[19] The DC Circuit issued a ruling on jurisdiction over payphones under an entirely separate section of the Act. *See* section 276. *Illinois Pub. Telecomm. Assn. v. FCC*, 117 F.3d 555 (D.C.Cir. 1997).

[20] The FCC's reliance on the impossibility exception as the basis for its authority did not surface until the issue was briefed before the Eighth Circuit. Nowhere, in its nearly 700 page First Report and Order, did the FCC even imply that its authority derived from the inability to separate the interstate aspects of ratemaking from the intrastate.

exception, also articulated in *Louisiana*, states that section 152(b) does not apply if the FCC has been assigned an express duty by Congress that it cannot carry out without preemption because it is impossible to separate the focus of that duty from state regulation. 476 U.S. at 376 n. 4. In that extraordinary situation, it is reasonable to assume that Congress did not intend section 152(b) to deter the FCC's execution of an unequivocal duty.[21]

The Eighth Circuit, however, correctly held that the impossibility exception to section 152(b) has no relevance to this case because the Telecommunications Act did not assign the FCC a duty to set local prices. (Pet. App. 21a). Because Congress expressly stated in sections 252(c)(2) and 252(d) that the states are to determine the rates for local telecommunications services, the Court held the FCC had no valid authority that was being threatened by the states. *Id.* Thus, the Eighth Circuit properly concluded the FCC had failed to demonstrate that the states' authority to establish rates in connection with the local competition provisions of the Act would render impossible the FCC's execution of any duty regarding interstate communications or impede any of its interstate regulatory goals. *See California v. FCC*, 75 F.3d 1350, 1359 (9th Cir.) *cert. denied*, 116 S. Ct. 1841 (1996).

The Eighth Circuit also pointed out that the cases decided by other circuits applying the impossibility exception did not have the assistance of a federal statute that specifically

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[21] In considering the impossibility argument and distinguishing these cases, the Eighth Circuit explained that telecommunication ratemaking has traditionally been capable of being separated into its interstate and intrastate components. (Pet. App. 20a). *Id.*

determined who had jurisdiction over the telecommunications area at issue. (Pet. App. 21a-22a). Those courts had to resort to analyzing the interstate/intrastate character of the telecommunications services. The Eighth Circuit's analysis was primarily based on basic statutory construction, not on an analysis of the interstate/intrastate character of the services. Nevertheless, there certainly is no conflict, because even applying this analysis, no preemption is necessary.[22]

CONCLUSION

This Court has previously reviewed each and every jurisdictional argument advanced by the petitioners, either in rejecting their requests to vacate the Eighth Circuit's stay or in *Louisiana*. No new grounds have been raised in these petitions. The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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[22] The Eighth Circuit followed up its construction of the statute with a finding that the functions of interconnection, unbundled access, resale, and transport and termination of traffic are fundamentally intrastate in character and the states' regulation of the rates for these services will not negate the FCC's traditional jurisdiction over interstate communications. (Pet. App. 22a).

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